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this Memorandum Decision shall not be  
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establishing the defense of res judicata,  
collateral estoppel, or the law of the  
case.

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**IN THE  
COURT OF APPEALS OF INDIANA**

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IN THE MATTER OF K.T.,	)	
	)	
Appellant-Respondent,	)	
	)	
vs.	)	No. 49A02-0703-JV-198
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Petitioner.	)	

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APPEAL FROM THE MARION SUPERIOR COURT  
The Honorable Geoffrey Gaither, Magistrate  
Cause No. 49D09-0612-JD-4885

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**December 3, 2007**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**FRIEDLANDER, Judge**

K.T. was adjudicated a delinquent child for committing acts that would constitute Battery,<sup>1</sup> a class A misdemeanor, and Disorderly Conduct,<sup>2</sup> a class B misdemeanor, if committed by an adult. K.T. challenges the true finding of disorderly conduct, presenting two issues for review. We need not address those issues, however, because we find a different issue dispositive of the appeal. That issue is: did the true findings of both battery and disorderly conduct violate double jeopardy principles under the Indiana Constitution?

We reverse and remand with instructions.

The facts favorable to the adjudication are that on November 9, 2006, K.T. and R.M. were on the same school bus and began to argue. K.T. went to the back of the bus, where R.M. was sitting, and hit R.M. in the chest. A fight ensued and the bus could not leave until the fight was broken up. R.M. suffered cuts and facial scratches as a result of the altercation.

On December 22, 2006, a delinquency petition was filed against K.T. alleging she had committed acts that would constitute the offense of battery as a class A misdemeanor if committed by an adult. At a February 8, 2007 denial hearing, the State orally moved to amend the petition in order to add an allegation of disorderly conduct, stemming from the

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<sup>1</sup> Ind. Code Ann. § 35-42-2-1 (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007).

<sup>2</sup> Ind. Code Ann. § 35-45-1-3 (West, PREMISE through 2007 Public Laws, approved and effective through April 8, 2007).

same incident. The court granted the motion over K.T.'s objection. Following a hearing, true findings were entered on both counts.

K.T. challenges the true finding of disorderly conduct, contending the last-minute addition of that allegation by oral motion to amend was improper.<sup>3</sup> We need not decide that question, however, because we conclude entering true findings on both counts violates double jeopardy principles under the Indiana Constitution.

In *Richardson v. State*, 717 N.E.2d 32 (Ind. 1999), our Supreme Court concluded that two or more offenses are the same offense in violation of article 1, section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to obtain convictions, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Double jeopardy attaches if the challenged offenses fail either the same elements test or the actual evidence test. *See id.* Under the actual evidence test, we examine the actual evidence presented at trial in order to determine whether each challenged offense was established by separate and distinct facts. *Id.* To find a double jeopardy violation under this test, we must conclude there is “a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense.” *Id.* at 53.

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<sup>3</sup> She does not challenge the true finding of battery.

The State concedes “[t]he disorderly conduct charge was predicated on the same facts as the battery charge – the fight on the school bus.” *Appellee’s Brief* at 5. As there was evidence of only one altercation between K.T. and R.M., there is a “reasonable possibility” the juvenile court used those facts to establish the essential elements of both battery and disorderly conduct. *Richardson v. State*, 717 N.E.2d at 53. Thus, we conclude that entering true findings of both battery and disorderly conduct violates Indiana Constitutional double jeopardy principles. *See D.B. v. State*, 842 N.E.2d 399 (Ind. Ct. App. 2006) (holding that juvenile adjudications implicate double jeopardy).

When two convictions, or, in this case, true findings in a delinquency adjudication, are found to contravene double jeopardy principles, we may remedy the violation by reducing either offense or true finding to a less serious classification if doing so will eliminate the violation. *Richardson v. State*, 717 N.E.2d 32; *D.B. v. State*, 842 N.E.2d 399. If it will not, one of the true findings must be vacated. *See D.B. v. State*, 842 N.E.2d 399. We will make this determination ourselves. *Richardson v. State*, 717 N.E.2d at 54.

Accordingly, we remand with instruction to vacate K.T.’s true finding of disorderly conduct. We note, however, that the adjudication of delinquency is unaffected, as it is supported by the true finding of battery, which K.T. does not challenge.

Judgment reversed and remanded with instructions.

SHARPNACK, J., and RILEY, J., concur.